NO. 48948-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

A.B.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
CLALLAM COUNTY, STATE OF WASHINGTON
Superior Court No. 15-8-00112-8

BRIEF OF RESPONDENT

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether a criminal offense of possession of marijuana and a probation violation for failing to attend school due to suspension are the same offense for purposes of RCW 13.40.070 when the juvenile was suspended for possession marijuana?

II. STATEMENT OF THE CASE

On April 16, 2015, A.B. pleaded guilty to Possession of Marijuana Under the Age of 21 and was placed on community supervision as a juvenile. CP 38, 43, 46. The juvenile court imposed the following condition of supervision:

> Respondent is further ordered to comply with the MANDATORY SCHOOL ATTENDANCE provisions of RCW 28A.225, and to inform respondent's school of the existence of this requirement. Respondent is to attend school without unexcused absences, tardiness or disciplinary referrals. Respondent is required to have full cooperation and participation in the classroom and maintain grades to the best of his/her ability.

CP 47 (4.13 (B.) Conditions of Supervision).

Subsequently, on Oct. 9, 2015, the Clallam County Department of Juvenile Services filed a Probation Violation Report with one allegation: Failure to attend school without unexcused absences or disciplinary referrals. CP 54. The Sequim School District's Notice of Disciplinary Action dated Oct. 8, 2015 which was attached as supporting evidence for the Probation

Violation Report states: "Reason For The Action: The reason for this action is the following alleged misconduct: [A.B.] was in possession of marijuana, a vaporizer and vapes." CP 55, paragraph 2. Paragraph 3 of the notice states: Rule(s) Violated: The following District Rules(s) are alleged to have been violated: 3241 P Exceptional Unsafe Misconduct #20 Alcoholic Beverages and Drugs. This is the second occurrence of this nature during [A.B.]'s high school career." CP 55. The notice also informs that the school placed A.B. on "long-term suspension" pursuant to WAC 392-400-260. CP 55.

On Oct. 9, 2015, the State filed a petition to modify the sentence based upon the school's action of suspending A.B. CP 52–56. A.B. admitted to the allegations and the juvenile court entered an order modifying community supervision. CP 57. Just over two weeks later, on Oct. 26, 2015, the Clallam County Prosecuting Attorney's Office received a Law Enforcement Referral from Sequim Police Department (SPD) requesting charges for Possession of Marijuana. CP 59.

On Nov. 5, 2016, the State filed a criminal information charging A.B with Possession of Marijuana Under the Age of 21. CP 75. A.B. filed a motion to dismiss the charge of Possession of Marijuana arguing that, under RCW 13.40.070 (3), the State may not pursue both a criminal charge and probation violation based upon the same conduct. CP 76. The juvenile court denied the motion. CP 20–25.

III. ARGUMENT

A. THE CRIME OF POSSESSION OF MARIJUANA AND A PROBATION VIOLATION FOR FAILURE TO ATTEND SCHOOL DUE TO SUSPENSION ARE NOT THE SAME OFFENSE OR CONDUCT.

> In lieu of filing an information or diverting an offense a prosecutor may file a motion to modify community supervision where such offense constitutes a violation of community supervision.

RCW 13.40.070 (3).

A.B. argues that the State was precluded under RCW 13.40.070 (3) from filing an information charging A.B. with Possession of Marijuana because the State had already filed a motion to modify community supervision for a violation based on the conduct of possessing marijuana.

1. The filing of the criminal charge of Possession of Marijuana and the probation violation for failure to attend school is consistent with the dual purpose of the Juvenile Justice Act.

> When resolving issues that depend upon the JJA's legislative purpose, we must ensure that our decision "effectuates to the fullest possible extent both the purpose of rehabilitation and the purpose of punishment."

State v. T.C., 99 Wn. App. 701, 707, 995 P.2d 98 (.2000) (citing *State v. Rice*, 98 Wn.2d 384, 394, 655 P.2d 1145 (1982).

A.B.'s argument equates the crime of Possession of Marijuana with a probation violation for failing to attend school regularly without disciplinary referrals. This claim ignores the dual purposes of the Juvenile Justice Act as

well as the full condition of supervision which was violated.

The probation violation was abbreviated in such a way as to ignore the purpose of the specific probation condition:

> Respondent is further ordered to comply with the MANDATORY SCHOOL ATTENDANCE provisions of RCW 28A.225, and to inform respondent's school of the existence of this requirement. Respondent is to attend school without unexcused absences, tardiness or disciplinary referrals. Respondent is required to have full cooperation and participation in the classroom and maintain grades to the best of his/her ability.

CP 47 (4.13 (B.) Conditions of Supervision).

It is clear on its face that the purpose of condition of supervision "B" is to attend to the needs of the juvenile student, or in other words, to effectuate the juvenile justice act's purpose of rehabilitation by encouraging A.B. to be fully engaged in his/her education. A.B. was in violation of this condition because *A.B. missed school.* On the other hand, the purpose for the criminal charge is punishment; to enforce state law and hold A.B. accountable for his/her actions.

2. The probation violation for missing school was not dependent upon the underlying conduct which led to the school suspension.

A.B. asserts possession of marijuana was the sole allegation leading to A.B.'s suspension from school. A.B. argues further that but for the conduct of possessing marijuana, A.B. would not have been suspended, and therefore, the probation violation was actually for possessing marijuana rather than

missing school.

The problem with this argument is that one does not need to possess marijuana to violate Condition B to attend school. In fact, the trial court in its decision on the issue indicated that the court was not considering the school authority's underlying reason for suspending A.B. CP 20.

Further, A.B.'s argument mischaracterizes the basis for the suspension when saying that the "sole" reason for the suspension was possessing marijuana. The suspension was also for possessing a vaporizer and vapes. CP 20, 55. The school's notice of suspension also suggests that the possession of the vaporizer and vapes alone may have been enough to justify suspension because this was A.B.'s second incident violating school policy. CP 55.

Additionally, it should be pointed out that it is unclear whether A.B.'s past incident of the same nature was a factor leading to the long-term suspension. *See* WAC 392-400-260 (4) ("As a general rule, no student shall be suspended for a long term unless another form of corrective action reasonably calculated to modify his or her conduct has previously been imposed upon the student as a consequence of misconduct of the same nature.").

Therefore, the probation violation was for missing school in violation of condition B, not for possessing Marijuana.

3. The school suspension is factually distinguishable from the crime of possession of marijuana.

The crime of possession of marijuana and the probation violation for missing school are distinguished in another way as well. The probation department would not have filed a violation report for violation of the school attendance condition had A.B. simply possessed marijuana outside the school grounds. Likewise, the school would not have suspended A.B. for possessing marijuana illegally elsewhere or for being convicted of that crime had it occurred elsewhere.

The school suspended A.B., at least in part, for possessing marijuana, and a vaporizer, and vapes *at school*. In particular, the school suspended A.B. for "Exceptional Unsafe Misconduct #20 Alcoholic Beverages and Drugs," not for the crime of possession of marijuana. CP 69.

4. *State v. Murrin* and *State v. Tran* do not support A.B.'s argument because they are factually distinguishable from the case at hand.

A.B. cites to *State v. Murrin*, 85 Wn. App. 754, 934 P.2d 728 (1994) and *State v. Tran*, 117 Wn. App. 126, 69 P.3d 884 (2003) for the proposition that RCW 13.40.070 (3) precludes the State from filing both a probation violation and criminal information based on the same conduct. *Murrin* and *Tran* are distinguishable from the instant case.

In *Murrin*, the State filed a motion to modify supervision based on a new offense, Taking a Motor Vehicle Without Permission, which occurred on

July 3, 1995. *Murrin*, at 729. The State later filed a criminal information charging Murrin with the same offense of Taking a Motor Vehicle without Permission which occurred on July 3, 1995. *Id.* at 757.

In *Tran*, the State filed a probation violation because Tran was caught driving a vehicle without a license on Jan. 19, 2002. *Tran*, at 128–29. "A few days after filing the probation modification, the State also filed an information charging Tran with driving without a license in violation of RCW 46.20.005." *Id.* at 130.

In both *Murrin* and *Tran*, the probation violations specifically alleged a new crime, Taking a Motor Vehicle Without Permission and a Driving Without a License. Then, in both cases, the State filed a criminal information alleging the same new crimes alleged in the preceding probation violations.

Murrin and *Tran* are therefore more on point when a criminal information alleges the same crime which was alleged as a probation violation. This is not what occurred in this case.

In the case at hand, the probation violation does not allege any criminal violation at all. The probation violation was for failing to attend school, or in other words, violation of the school attendance "condition B" in A.B.'s "Order on Adjudication and Disposition." CP 47.

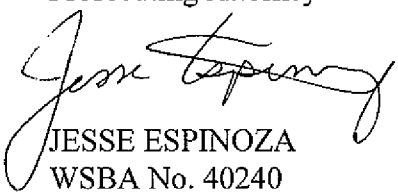
Therefore, *Murrin* and *Tran* do not apply to the facts at hand.

IV. CONCLUSION

The State was not precluded under RCW 13.40.070 (3) from filing a charge for Possession of Marijuana by a person under 21 in this case because the criminal charge and the probation violation for Failing to Attend School are not the same. For all the foregoing reasons, the Court should affirm.

Respectfully submitted this 17th day of January, 2017.

MARK B. NICHOLS
Prosecuting Attorney



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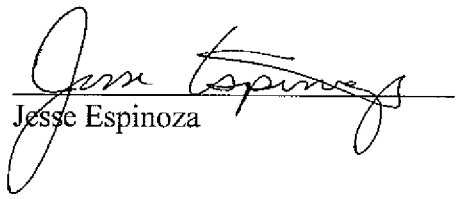

Jesse Espinoza

CLALLAM COUNTY PROSECUTOR

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